Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-757

OLD DOMINION FREIGHT LINE, INC.
AND BARNES TRUCK LINE, INC.,
Appellants

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION AND
COLONIAL MOTOR FREIGHT LINE, INC., ET AL.,
Appellees.

BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

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Pursuant to Rule 16(4) of the rules of this Court, appellants Old Dominion Freight Line, Inc. and Barnes Truck Line, Inc., submit this brief in opposition to the motions filed by the United States and Interstate Commerce Commission and by intervening appellee, Colonial Motor Freight Line, Inc., to affirm the decision and order of the United States District Court for the Middle District of North Carolina.

1. The Government's reliance upon *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, is misplaced. The result of this Court's decision (as well as the Commission's) in that case was to expand the competitive scene and permit entry of additional competing carriers, whereas the effect of the Commission and lower court decisions in the instant proceeding is to the contrary, i.e. to restrict competition by reducing the amount of available carrier services in the involved market. Justice Douglas, speaking for a unanimous Court in *Bowman*, stated:

> "Our decisions have dispelled any notion that the Commission's primary obligation is the protection of firms holding existing certificates."

The Commission here, however, refused to acknowledge the real lessons of *Bowman* and has, wholly without record justification, over-protected the only opposing existing carrier.

2. The Government's attempt to distinguish the *Wright Trucking, Inc.* v. *United States*, D. Mass., Civ. No. 73-1445-C (April 3, 1975), decision and its rationale from the decision reached by the lower Court here is strained to the point of being misleading. The three judge court in *Wright* was concerned with the shifting standards apparently utilized by the Commission in passing upon motor carrier merger applications under Section 5 of the Act. The facts involved in the proceeding here under review present an even more graphic illustration of the Commission's refusal in some cases to apply with some degree of fairness and consistency the promulgated standard, i.e. the "substantiality test," favoring instead mere conclusionary findings and the complete absence of any articulation of a new standard. The court below did not find that the Commission had applied the "substantiality test" to the facts involved in this proceeding, nor did the Commission actually apply any standard with a rationalized explication, as a reading of the Commission decisions and orders clearly reveals, despite the Government's argument to the contrary. The court below failed to come to grips with issues raised, and simply rubber stamped or automatically sanctioned the Commission's abandonment of its "substantiality test," which decision is entirely contrary to that reached by the court in *Wright*.*

3. Finally, appellee's assertion that this Court's admonition in *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, against "atomization" of motor carrier operating authorities actually sanctions the Commission action here is wholly without foundation. The Commission has since *Carolina* decision consistently applied the teaching of that case, including the Court's admonition against "atomization," in motor carrier merger cases. (See Appellants' Jurisdictional Statement, pp. 22-24) As a final matter, the Government's argument to the effect that *Carolina* somehow sanctions the Commission action here borders on the absurd, for it would require one to ignore the numerous commodities and shipments handled by appellee Barnes under its general and special commodity authorities. In short, the Government says "forget the record", let's get to a conclusion supported or not by fact or reason.

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* As a pedestrian aside, it is worthy of note that the Commission did not appeal the District Court's decision.

CONCLUSION

The Commission and lower court both erred, and probable jurisdiction should be noted.

Respectfully submitted,

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